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Pleading and Practice--Section 52-a of the Vehicle and Traffic Law Construed (Marano v. Finn, 155 Misc. 793 (App. T. 1st Dept. 1935))

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PLEADING AND PRACTICE—SECTION 52-A OF THE VEHICLE AND TRAFFIC LAW CONSTRUED.—Defendant, a resident of New York State, had been absent therefrom for more than thirty days attending college in another state. The question is whether at the time he was served the defendant had removed from the state within the meaning of Section 52-a of the Vehicle and Traffic Law,[1] which provides for constructive service on operators and motor vehicles on a public highway who shall have removed from the state prior to the commencement of an action against them growing out of any accident in which they might have been then involved and who shall have been absent for more than thirty days continuously therefrom. On appeal from an order vacating the summons and complaint, *held,* for the defendant. The word "remove", as construed, indicates a legislative intention to require more than a temporary absence and hence the constructive service is ineffectual. *Marano* v. *Finn,* 155 Misc. 793, 281 N. Y. Supp. 440 (App. T. 1st Dept. 1935).

The section under discussion is a remedial one, facilitating the enforcement of civil remedies by those injured in person or property by the negligent operation of motor vehicles on the public highway.[2] No difficulty is encountered in construing the section as applicable to residents who leave the state with an intent to establish a domicile elsewhere.[3] In the instant case, the court argues that the use of the word "removed" and of the language in the title and text of the section indicates a legislative intention to confine the statutory remedy to the above situation and none other. However, we note that "removed" is used in conjunction with the word "absent" and the court could have stressed the latter word rather than the former one as the determining factor in permitting constructive service so as to save the injured party's remedy. Physical absence and non-residence are not merely varying forms of the same concept.[4] Although the literal and technical meaning of the language used in the title and text of the section might seem to imply otherwise,[5] still in

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[1] N. Y. CONS. LAWS (1931) c. 71.

[2] Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632 (1927); Continental Casualty Co. v. Nelson, 147 Misc. 821, 264 N. Y. Supp. 560 (1933).

[3] Kurland v. Chernobil, 260 N. Y. 254, 183 N. E. 380 (1932).

[4] Mack v. Mendels, 249 N. Y. 350, 164 N. E. 248 (1928). In Universal Credit Co. v. Knights, 145 Misc. 876, 261 N. Y. Supp. 252 (1932), it was held that removal of a temporary character was not the removal contemplated by N. Y. Personal Property Law, Section 74, and the elaborate machinery set up for refiling was intended for a permanent and continuous change rather than one of a transitory, temporary character. We note, however, that the section was strictly construed in favor of the conditional seller since it deprived him of his common-law rights.

[5] Kurland v. Chernobil, 260 N. Y. 254, 183 N. E. 380 (1932); *cf.* Rawstorne v. Maguire, 265 N. Y. 204, 192 N. E. 294 (1934) (the test of residence was held to be domicile in connection with an order for substituted service of summons under Section 230 of the Civil Practice Act); Mack v. Mendels, 249 N. Y. 350, 164 N. E. 248 (1928) (it was held that non-residence does not constitute absence within the meaning of Section 48 of the Civil Practice Act).

view of the remedial nature of the legislation, designed to afford greater protection to the personal safety of the travelers and to promote the public safety, and the apparent objectives sought to be attained, it is submitted that the term "non-residents" should be held to express the connection between person and place [6] and not as a synonym for domicile [7] and that the strict, literal interpretation of the statute be not adopted.[8] This decision limits the practical effectiveness of the section as an aid to the encouragement of greater care in the operation of motor vehicles and to the protection of the rights of injured persons.

A. S.

PLEADING AND PRACTICE—SERVICE OF PROCESS—IMMUNITY OF NON-RESIDENT AT APPELLATE HEARING.—Plaintiff, a resident of Connecticut, accompanied her counsel to the Appellate Division to hear the argument of her case. While returning home, she was served with a summons in a foreclosure suit. On appeal from an order denying a motion to set aside the service, *held,* order reversed, motion to set aside granted. Plaintiff is privileged from service of process while attending the argument of an appeal. *..Chase National Bank* v. *Turner,* 269 N. Y. 397, 199 N. E. 636 (1936).

A non-resident coming to this state solely to appear as a party or witness in a judicial proceeding is immune from service of civil process during the proceeding and for a reasonable time thereafter.[1] This immunity is a common law privilege and is intended to encourage voluntary appearance of non-residents and to secure the expedient administration of justice.[2] Non-residents who are here by compulsion of law are not so privileged.[3] Nor are persons who come here for the dual purpose of attending the proceeding and discharg-

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[6] Cincinnati H. & D. R. Co. v. Ives, 3 N. Y. Supp. 895 (Sup. Ct. 1889).

[7] "The courts have invariably distinguished residence from domicile particularly in connection with the construction of various statutory provisions." General Motors Acceptance Corp. v. Barrett, 142 Misc. 192, 196, 254 N. Y. Supp. 166, 170 (1931).

[8] Surace v. Danna, 248 N. Y. 18, 161 N. E. 315 (1928); Glennie v. Falls Equipment Co., 238 App. Div. 7, 11, 263 N. Y. Supp. 124, 129 (4th Dept. 1933).

[1] 2 CARMODY, N. Y. PRACTICE (1930) § 648.

[2] Person v. Grier, 66 N. Y. 124 (1876); Mathews v. Tuffts, 87 N. Y. 568 (1882); Parker v. Marco, 136 N. Y. 585, 32 N. E. 989 (1893); Netrograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962 (1910).

[3] Williams v. Bacon, 10 Wend. 636 (N. Y. 1834); Slade v. Josephs, 5 Daly 187 (N. Y. 1870); Adriance v. Lagrave, 59 N. Y. 110 (1874); People *ex rel.* Post v. Cross, 135 N. Y. 536, 32 N. E. 246 (1892); Netrograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962 (1910).